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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 88.

THOMAS D. CLANCY and DONALD KASTNER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONERS.

PAUL P. WALLER, JR.,
JOHN F. O'CONNELL,
234 Murphy Building,
234 Collinsville Avenue,
East St. Louis, Illinois,
Counsel for Petitioners.

O'CONNELL & WALLER,
Of Counsel.

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REPLY BRIEF FOR PETITIONERS.

STATEMENT.

We, the Petitioners' attorneys, categorically deny the statements in the Brief of the Respondent that we received signed, verbatim, carbon copies of the joint report of Agents Mochel and Buescher.[1] So seriously do we view this complete misrepresentation of the facts that we have filed our Affidavits with the Clerk (Appendix infra pp. 14-16) unequivocably denying that we received any of these reports contained in the Government's Appendix.

[1] U. S. Brief, pp. 49, 50 and 51, Footnote 19; Appendix C, pp. 65-68.

ARGUMENT.

The Government in its Brief has changed its position so completely that we feel as did Justice Jackson in the Orloff Case[2] that they are not arguing the questions presented, but "nimbly dancing a quadrille". The Government has completely abandoned the holding of the District Court and the Court of Appeals in justifying the seizure of the books and records as instrumentalities of the attempt to evade the 10% wagering tax and Court of Appeals Classification as within the "required records" exception.

The Government has further shifted its position and now contends for the first time that Petitioners failed to register "each" place at which they did business, and, therefore, the private books and records used to conduct their wagering business constituted the instrumentalities for operating a business in violation of Federal law, a crime not alleged in either the search warrant or the Indictment. The Government has now injected a completely new theory into this case, which practice was criticized by this court in **Giordenello v. U. S.**, 357 U. S. 480.

We feel that we must apologize for the length of this Brief but in order to successfully meet the new theories of the Government it is necessary for us to argue at greater length.

I. The Search and Seizure.

A-1. Although the Government does not deny the fact that Petitioners did prepare and file their Application for Registry-Wagering (Form 11-C) (U. S. Ex. 14, R. 84) and paid the $50.00 special tax, they now contend that Petitioners by answering Question 5a on Form 11-C, (See Appendix p. 13) with the words "at large", that this con-

[2] Orloff v. Willoughby, 345 U. S. 83.

stituted a failure to register. For four consecutive years, the Petitioners filed their "at large" registrations (U. S. Ex. 11-14; R. 84), were issued wagering stamps (Def. Ex. 1 and 2, R. 142), and were never directed by the District Director of Internal Revenue to cease or desist from this practice.

Government Agent-witness Joseph Heckelbeck, head of the Collection Division, testified, "To my knowledge, there is nothing wrong in operating 'at large'" (R. 86); and further, "The application for the special stamp must be in order by the statute before we can issue it" (R. 86). Government Witness Press Waller, who prepared the applications in behalf of Petitioners, also testified: "Q. What does that 'at large' mean?" "A. They can do business anywhere". "Q. That was the purpose of inserting that?" "A. Yes, sir" (R. 41).

At the time the Petitioners filed their registration (Form 11-C), they listed their business address as "At Large—2401 Ridge Avenue, East St. Louis, Illinois", the residence of Clancy as indicated on all four of the registrations (Form 11-C) previously filed by them (U. S. Ex. 11-14; R. 84). The precise time at which the words "At Large" before the address, were crossed out in the registration for 1956-1957 is not known to the Petitioners.[3] However, they do know that it was not crossed out when it was filed by their accountant, and it was not returned for correction (R. 141). Since this application was in the hands of Government agents at all times subsequent to being filed, it must have been done by one of them. No attempt was made by the Government agents to also alter the information supplied in Paragraph 5a; that Petitioners operated their business "at large".

[3] The same type of alteration was made on an Application for Registry-Wagering filed with the same District Director of Internal Revenue and introduced in evidence in the case of *U. S. v. Sheer, Foster and Jackson*, 278 F. 2d 65, which was tried one week later in the same District Court in which this case was tried.

The record is clear that the Petitioners did operate "at large". 2300a State Street was not a permanent place of business. Government witness Henry Zittel testified that his father lived upstairs above his tavern at 2300a State Street, and that the Petitioners were in and out of there after he took over the tavern on January 1, 1954 (R. 122). Government witnesses Burns and Lampe testified that their telephones were used sometimes by Mr. Prindable to accept wagers (Appellee's App. pp. 25-26). Government Witness Manning testified that his telephone bills were paid by James Prindable (one of the partners of the North Sales Company), and that it was Mr. Prindable's idea to have the telephone installed (Appellee's App. pp. 27-28). Government Agent-witnesses Mochel and Buescher both testified that on December 13, 1956, Clancy told them there was no particular place of business although his residence at 2401 Ridge Avenue was the address used for the wagering tax business (R. 100 and 142).

Once the Application for Registration is filed and accepted, the requirements of the statute are met, except that a taxpayer is required to file a supplemental return if he obtains new agents (Int. Rev. Reg. 325.50 (c)) or changes his business or residence address to a location other than that specified in his last Special Tax Return (Int. Rev. Reg. 325.57 (a)). Since Petitioners had no principal place of business, using Clancy's residence address and this not being changed, there was no obligation for them to file a supplemental registration. Although the language of the above regulation (325.57 (a)) does not say the address of his "principal" place of business, neither does it say "each" place of business. "Business address" is used in the disjunctive with "residence address", and since this requirement is contained in the regulation (325.57) dealing with a change of address for the purpose of determining in what collection district a taxpayer registers and pays his

3A R. 123, 124, 138

tax, it must mean "principal place of business". The reason being that where a person registers and pays his tax is determined by the location of his principal place of business or his residence if he has no principal place of business (Int. Rev. Reg. 325.50 (a)).

Certainly, the government after having issued stamps on Petitioners' "at large" registration for four years without once indicating to the Petitioners that this was not an acceptable registration, cannot now say, at this late stage, that the filing of an "at large" application exposed these Petitioners to being charged with **wilfully** having failed to register. "At large" can have only one meaning, that they operated at no definite permanent place.

A-2. All of the known facts must be presented to the District Judge before he can make an independent judgment of probable cause. We say Internal Revenue Agents Yerly and Edwards acted in bad faith when they withheld from the issuing Judge after examining the Registrations (Form 11-C) of Charles J. Kastner (R. 16-17) and James Prindable (R. 14-15) that Prindable was a partner in the North Sales Company; that it was clearly stated in his Registration (Form 11-C) (App. 13) that the North Sales Company operated "at large" in answer to Question 5a; that Charles Kastner was listed as an agent accepting wagers in behalf of the North Sales Company; and that the O. K. marked in front of Charles Kastner's name on the North Sales Registration (Form 11-C) (U. S. Ex. 14) indicated that the records had been examined to determine that Charles Kastner had a wagering stamp. If the Court had been informed that Prindable, a partner in the North Sales Company, registered under an "at large" registration (Form 11-C) and that Charles Kastner was listed as an agent on the same registration, the immediate reaction as a "reasonably prudent man" should have been that this was one of the places where North Sales Co. was

operating "at large" that day, or in the alternative that Petitioner had established a principal place of business and were not yet required to file a supplemental registration because 30 days had not yet elapsed (Int. Rev. Reg. 325.57 (a) App. 18).

A-3. The Government next contends that there was probable cause even though the North Sales Company had filed its Application for Registry-Wagering, and paid the $50 tax, since the warrant was directed to specified property located at a designated address and not to Petitioners or North Sales Co.[3] There is no substance to this argument for two obvious reasons: First, as demonstrated in the preceding paragraphs, the Internal Revenue Agents knew, without question, that Prindable and Charles Kastner, whose activities they observed at 2300a State Street, were partner and agent respectively of North Sales Co. which was issued a wagering stamp pursuant to an "at large" registration. Secondly, even though the agents may have sincerely believed that there was probable cause, when it was proved at the hearing on the Motion to Return the Property filed pursuant to Rule 41 (e)[4] by an uncontroverted affidavit and stipulation that 2300a State Street was merely one of the places at which Petitioners were operating their wagering business on the day of the unlawful seizure of Petitioners' private books and records, the property should have been ordered returned by the court.

The Government's own witness, Press Waller,[5] testified that a taxpayer registered under an "at large" registration could do business anywhere (R. 141). A wagering

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[4] Federal Rules of Criminal Procedure.

[5] A former Division Chief of the Internal Revenue Department with 17 years experience and a former supervisor of 27 counties in Southern Illinois.

stamp is issued to the **taxpayer**, and not to each **place** at which the wagering business is conducted (26 U. S. C. 4903). Since the Government recognized and accepted "at large" registrations, it certainly should not come as a surprise to the Government that persons so registered would conduct business at an address not included in their registration (Form 11-C).

B-1. The search warrant authorized the seizure of certain property which "have been and are now being used" as a **means of committing** the crimes of (1) wilfully attempting to evade a tax, to-wit: the special tax of $50 per year; and (2) wilfully failing to prepare and file . . . (Form 11-C). Therefore, the search warrant authorized the seizure **only of the means or instrumentalities by which the crimes alleged in the search warrant had been or were being committed.** Since the crimes alleged in the search warrant had, in fact, not been committed, then it follows that there could be no instrumentalities for committing these crimes, and accordingly, no items were subject to seizure under authority of that warrant unless they had been so used.

The Government has completely rephrased the search warrant for its own purposes, and alleges that it charges, in effect, the crime of carrying on the wagering business without having registered. There is no federal prohibition in the **statutes** against carrying on wagering businesses **without having first registered.** The prohibition is against carrying on the business until the tax has been paid (26 U. S. C. 4901).

Furthermore, the Government is attempting to justify the seizure in this case on grounds totally different from those determined in the search warrant (R. 52). Wilfully failing to file the application for registration is a totally different offense than **wilfully** failing to supply some of the

information requested in said form, which is a separate crime.[6]

"Rule 41 is a codification of pre-existing statutory and case law relating to searches and seizures".[7] Under the existing law at the time Rule 41 was adopted (Old 18 U. S. C. Sec. 612 (2)) a search warrant could be issued to seize only property which was being used to commit a felony. Even taking the Government's position as being true—which we deny—the wilful failure to supply all of the information requested in the registration, or even wilfully failing to file the registration (Form 11-C) itself, would only make the Petitioners guilty of violating 26 U. S. C. Sec. 7203 (Government App. p. 58), a misdemeanor. Therefore, under Old 18 U. S. C. Sec. 612 (2), a search warrant would not issue to seize those instrumentalities used as a means of commiting either of these misdemeanors.

The Government's contention is that the Petitioners' private books and records used to conduct their wagering business are the means for carrying on a criminal enterprise because it is alleged that they failed to supply all of the information required in their application for registration. If this is true, then if a merchant fails to supply all of the information required of him in his income tax return, he then is operating a criminal enterprise, and all of his books and records would be the means for carrying on a criminal enterprise and subject to seizure.

The question of "reasonable belief" or "probable cause" goes to the question of the proper issuance of the warrant, but does not justify the seizure thereof. Just as

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[6] Pappas v. U. S., 216 F. 2d 515, 10 Cir.

[7] Barron and Holtzhoff, Federal Practice & Procedure, Vol. 4, p. 348; See also Notes of Advisory Committee on Rules, Rule 41, Federal Rules of Criminal Procedure.

this court said in **Henry v. U. S.**, 80 S. Ct. 168, "If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. **Carroll v. U. S.**, 267 U. S. 132, 156; 45 S. Ct. 280, 286; 69 L. Ed. 543." Thus, the question of probable cause or the reasonable belief of the agents is viewed for the purpose of determining whether or not they acted with or without authority, and whether they had a right to **inspect** the property. However, if the property seized is not an instrumentality for the commission of the crimes alleged in the search warrant, or if, in fact, the crime had not been committed, the property must be returned.

B-2. Has already been answered above.

C-1. The government has completely abandoned the holding of the Court of Appeals that Petitioners' books and records were instrumentalities of the attempt to evade the 10% wagering tax or that they were within the "required records" exception. However, the Government argues that since the original seizure was valid—which we deny—that the subsequent retention of the property and its use in evidence against Petitioners was also valid. In support of this proposition they cite the Gouled[8] and Abel[9] cases, neither of which are authority for this proposition.

The Gouled case was reversed by this court because the seized papers were obtained by unlawful searches and seizures. All other language was dicta. In the Abel case, although this court upheld the admission of the property seized in a prosecution for a different crime, it was careful to point out that the articles were also instrumentalities for the commission of the crime of espionage, which the property was introduced to prove.

[8] Gouled v. U. S., 255 U. S. 298.

[9] Abel v. U. S., 362 U. S. 217.

Thus, since the private books and records were not instrumentalities for the crimes alleged in the search warrant or crimes for which Petitioners were indicted, their admission in evidence constituted a violation of their rights under the V Amendment.

II. Production of Agent-Witnesses' Reports.

The United States Attorney, who is purported to have stated that we received signed, verbatim copies of Agent witnesses' Mochel and Buescher's reports, did not participate in the trial of the case, and was seldom in the Court room during the course of the trial.

The "assistant" United States Attorney, Mr. Robert McKnelly,[19] who tried this case for the Government confirms our statements that we never received the reports of the agents as set out in the Appendix to the Government Brief.

The Government has always heretofore stoutly maintained that we received the **longhand notes written contemporaneously with the interview** and these, under the law, were all to which we were entitled. When the Government filed its Answer to our Petition for Rehearing in the Court of Appeals stated (p. 6) "In any event, in the instant case plaintiff, upon demand by defendants, made available the agents' **longhand notes taken at the time of the interview** (R. 396), which were the basis for the **subsequently** prepared investigative reports (R. 195, Def. App. 102)" (Emphasis supplied).

The Solicitor General in his Brief in opposition to our Petition for Writ of Certiorari at page 11 said, "In any event, we believe that, in the circumstances of this case,

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[19] Whose present address is Barrister Building, 107 North Elm Street, Champaign, Illinois, Telephone FLeetwood 2-7676.

the trial court's refusal to command the production of Agent Witnesses' formal reports constituted harmless error. Following the direct testimony of Agents Hudak, Mueller and Mochel, **longhand notes of the interviews with the defendants, which were prepared contemporaneously with the interviews,** and constituted the basis of the later prepared reports, were turned over to defense counsel for inspection" (Emphasis supplied). And on page 12 of the same Brief, the Solicitor General argued, "Petitioners, in short, received the 'work product' **from which the reports denied them** were compiled, **transcribed at the exact time the interviews occurred**" (Emphasis supplied.

It is difficult to believe that if the Government had delivered these signed verbatim copies of the reports contrary to the ruling of the trial judge, that they would suggest it here for the first time, and that the Asst. U. S. Attorney who tried this case would not have raised it previously.

The Solicitor General is completely departing from the law governing appeals when he goes completely outside the record to attempt to impeach the record by a statement that cannot even be considered as evidence, but we deem this so serious that we refuse to hide behind these established principles and prefer to meet the Solicitor General headon by our Affidavits.

The Government has conceded that there can be no questioning about the reversible error committed in refusing Agents Buescher and Mochel's signed statements. As to Agent Minton's report, we submit that the Government cannot dictate the defendants' strategy of trying a lawsuit, and because we did not request Agent Kienzler's report in no way made the refusal of the court to allow us to have Agent Minton's report harmless error.

CONCLUSION.

We respectfully request, for the reasons above stated, that the judgments of both lower courts be reversed; that this case be remanded to the district court with instructions to the trial judge to allow Petitioners' Motion for Return of Property and to Suppress Evidence, and to also order the return of all copies, schedules and other information obtained from said papers.

All of which is respectfully submitted.

PAUL P. WALLER, JR.,

JOHN F. O'CONNELL,
214 Murphy Building,
234 Collinsville Avenue,
East St. Louis, Illinois,
Counsel for Petitioners.

O'CONNELL & WALLER,
Of Counsel.

APPENDIX.

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U. S. Treasury Department—Internal Revenue Service

FORM 11-C
Rev. Jan. 1955

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See instructions on reverse for time and place for filing return)

4 241

Return for period from July 1st, 1956 to June 30, 19 57
(Month, day, and year)

1. Name: True name Donald Kastner, James Prindable & Thomas Clancy d/b/a

Alias, style, or trade name, if any North Sales Company

2. Address: Residence

Business at Large- 2401 Ridge Ave-E.St.Louis, Ill.

3. If this is merely an application for registry with which no remittance of tax is required, please explain and give your Special Tax Stamp No. and Registry No. (see instruction 2)

JOURNALIZED
JUL 12 1956

For District Director's Use Only

(Stamp number)

(Date issued)

37-2369 P
(Registration number)

Tax	$
Penalty	$
Total	$

Make remittance payable to "District Director, I.R.S." Payment may be made by cash, check, or money order.

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address
Donald Kastner	Partner	1510 N. 49th St-E. St. Louis, Ill.
James Prindable	Partner	1741 Belmont-E. St. Louis, Ill.
Thomas Clancy	Partner	2409 Ridge Ave-E. St. Louis, Ill.

5. Are you engaged in the business of accepting wagers on your own account? ☒ Yes ☐ No (Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is conducted

Name of location	Street address	City and State
At Large		

RECEIVED WITH REMITTANCE
JUN 29 1956
37
DIV. INT. REV.
SPRINGFIELD, ILL.
CASHIER

(b) Number of employees and/or agents engaged in receiving wagers on your behalf 2

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. in present use	Street address	City and State
Malcolm H. Wagstaff	None	2401 Ridge Ave.,	E. St. Louis, Ill
Charles Kastner		1112 Summit Ave-E.	St. Louis, Ill

6. Do you receive wagers for or on behalf of some other person or persons? Yes ☒ No (Check one)

If yes, give true name and address of each such person.

True name	Street address	City and State
North Sales Co-	2401 Ridge Ave-	E. St. Louis, Ill.

— 13 —

State of Illinois,
County of St. Clair. } ss.

AFFIDAVIT.

I, Paul P. Waller, Jr., being first duly sworn, depose and state upon my oath that I am a member of the Bar of the State of Illinois and have been for 10 years last past; that I am a member of the Bar of the State of Missouri; that I am a member of the Bar of the Supreme Court of the United States; that I maintain offices for the practice of law at 214 Murphy Building, 234 Collinsville Avenue, East St. Louis, Illinois; that I was one of the attorneys, John F. O'Connell being the other attorney, who represented the Petitioners Thomas D. Clancy and Donald Kastner during the trial of the case in the United States District Court for the Eastern District of Illinois, styled United States of America v. Thomas D. Clancy, James F. Prindable, and Donald Kastner, Criminal No. 18,831, commencing on the 11th day of May, 1959, and concluding on the 14th day of May, 1959; that pursuant to Title 18, U. S. C., Section 3500, a demand was made for the reports of Government Agents Wilbur Buescher and Martin O. Mochel, but the court refused said demand and permitted only the longhand notes made contemporaneously with the interview to be produced; that longhand notes of these Agent-witnesses were the only papers produced for this attorney's inspection; and that the memoranda of interviews contained in the Solicitor General's Brief on pages 62-74, Appendix B, C, D, E, F and G were never produced for inspection by this attorney, nor were they ever seen by this attorney until what purports to be copies of them appeared in the Solicitor General's Brief.

Dated this 2nd day of January, 1961.

Paul P. Waller, Jr.

Subscribed and sworn to before me this 2nd day of January, 1961.

(Seal) Wanda Jean Cowell,
Notary Public.

My commission expires: January 14, 1961

State of Illinois,
County of St. Clair. ss

AFFIDAVIT.

I, John F. O'Connell, being first duly sworn, depose and state upon my oath that I am a member of the Bar of the State of Illinois and have been for 13 years last past, and that I maintain offices for the practice of law at 214 Murphy Building, 234 Collinsville Avenue, East St. Louis, Illinois; that I was one of the attorneys, Paul P. Waller, Jr., being the other attorney, representing the Petitioners Thomas D. Clancy and Donald Kastner during the trial of the case in the United States District Court for the Eastern District of Illinois, being styled United States of America, Plaintiff, vs. Thomas D. Clancy, James A. Prindable and Donald Kastner, Criminal No. 18,831, commencing on the 11th day of May, 1959, and concluding on the 14th day of May, 1959; that pursuant to Title 18, U. S. C., Section 3500, a demand was made for the reports of Agent-witnesses Wilbur Buescher and Martin O. Mochel, but the court refused said demand and permitted only the long-hand notes made contemporaneously with the interview to be produced. These longhand notes were the only papers of these Agent-witnesses produced for this attorney's inspection and the memoranda of interviews listed in the Solicitor General's Brief on page 62, Appendix B, C, D, E, F and G were never produced for inspection by this attorney, nor were they ever seen by this attorney until what

purports to be copies of them appeared in the Solicitor General's Brief.

Dated this 2nd day of January, 1961.

John F. O'Connell.

Subscribed and sworn to before me this 2nd day of January, 1961.

(Seal)

Wanda Jean Cowell,
Notary Public.

My commission expires: January 14, 1961.

Federal Rules of Criminal Procedure, Rule 41, Search and Seizure.

"(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion,

but the court in its discretion may entertain the motion at the trial or hearing.

Title 18, Section 612, Grounds for Issue.

"A search warrant may be issued under this Chapter upon either of the following grounds:

"2. **When the property was used as the means of committing a felony**; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be" (Emphasis supplied).

Title 26, Section 4901, Payment of Tax.

"(a) Condition Precedent to Carrying on Certain Business.—No person shall be engaged in or carry on any trade or business **subject to the tax imposed by section 4411 (wagering)**, 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he **has paid the special tax therefor**" (Emphasis supplied).

Title 26, Section 4903, Liability in Case of Business in More Than One Location.

"The payment of the special tax imposed, **other than the tax imposed by section 4411**, shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the register kept in the office of the official in charge of the internal revenue district . . ." (Emphasis supplied).

Internal Revenue Regulations 325.50.

"§ 325.50. Registry, return and payment of tax (a) No person shall engage in the business of accepting wagers subject to the 10 percent excise tax imposed by section

3285 of the Internal Revenue Code (see § 325.24) until he has filed a return on Form 11-C and paid the special tax imposed by section 3290. Likewise, no person shall engage in receiving wagers for or on behalf of any person engaged in such business until he has filed a return on Form 11-C and paid the special tax imposed by section 3290 of the Internal Revenue Code. Filing of successive applications and payment of tax by such persons are required on or before July 1 of each year thereafter during which taxable activity continues. **The return, with remittance, shall be filed with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides.** If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Baltimore, Maryland. The collector, upon request, will furnish the taxpayer proper forms which shall be filled out and signed as indicated therein" (Emphasis supplied).

Internal Revenue Regulations 325.57.

"§325.57 Change of address—(a) Procedure by taxpayer. Whenever a taxpayer changes his business or residence address to a location other than that specified in his last special tax return (see § 325.50) he shall, **within 30 days after the date of such change,** register the change with the collector from whom the special tax stamp was purchased, by filing a new return, Form 11-C, designated 'Supplemental Return', and setting forth the new address and the date of change. The taxpayer's special tax stamp shall accompany the supplemental return for proper notation by the collector. As to liability in case of failure to register a change of address within 30 days, see § 325.58" (Emphasis supplied).

"(c) Procedure by collector: removal to another district. In case of removal of the taxpayer's office or principal place of business (or residence address, if he has no office or principal place of business) to another collection district, the collector will note the transfer on his Record 10, stating the change of location, and shall then transmit the special tax stamp to the collector for the district to which such office or business was removed. The latter will make an entry on his Record 10, as in the case of an original registration in his district, correct the address on the stamp, if necessary, and note also thereon his name, title, date, and district, and then forward the stamp to the taxpayer."

SUPREME COURT OF THE UNITED STATES

No. 88.—October Term, 1960.

Thomas D. Clancy, et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 27, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

This case presents an important question under 71 Stat. 595, 18 U. S. C. § 3500, the statute sometimes referred to as the Jencks Act as it deals with the problems presented in our decision by that name. *Jencks* v. *United States*, 353 U. S. 657. Petitioners were charged with making false statements (18 U. S. C. § 1001), with attempting to evade the wagering excise tax (26 U. S. C. § 7201), and with conspiring to defraud the United States of internal revenue taxes (18 U. S. 371). They were found guilty and the judgments of conviction were affirmed. 276 F. 2d 617. The case is here on a writ of certiorari. 363 U. S. 836.

At the trial Minton, a government Agent, testified concerning an interview with petitioner, Kastner, at which he was present. Minton testified "I did not take any notes at the time, but afterwards I returned to the office and made a memorandum of the interview." Counsel for Kastner asked the court for the production of that memorandum pursuant to the Jencks Act.[1]

[1] 18 U. S. C. § 3500 provides in relevant part:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) to an agent of the Government shall

Other government witnesses testified to conversations they had had with Clancy, Kastner, and a third partner in petitioners' wagering business. One of the witnesses, Agent Bueschner, testified he had taken no notes during these interviews, but had "compiled a memorandum" from notes taken at the time of the interview by the second witness, Agent Mochel. Both Bueschner and Mochel testified that they had signed the later memoranda of the conversations. Counsel for petitioners requested production of the memoranda, and the requests were refused.

The trial court, though directing delivery to the defense of notes made by the witnesses at the time of the interviews, refused the requests for the memoranda saying that written statements were not covered by the Jencks Act unless they were made "contemporaneously" with the interview. The Government now concedes that this was an erroneous ruling, as indeed it was. Each of these

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be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(e) The term 'statement' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) A written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

statements related "to subject matter as to which the witness has testified." [2] Each was a "statement" as that word is defined in the Act.[3] The requirement that it be contemporaneous applies only to "a substantially verbatim recital of an oral statement" made to a government agent.[4] By the terms of the Act,[5] "A written statement made by said witness and signed or otherwise adopted or approved by him" is also included. These statements fell in that category and should have been produced. *Campbell* v. *United States*, decided January 23, 1961. And see *United States* v. *Sheer*, 278 F. 2d 65, 67–68. As the Senate Report on the bill that became the Jencks Act states: [6]

> "The committee believes that legislation would be clearly unconstitutional if it sought to restrict due process. On the contrary, the proposed legislation, as reported, reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to reports and statements in possession of the Government touching the events and activities as to which a government witness has testified at the trial.
>
> "The purpose of the proposed legislation is to establish a procedural device that will provide such a defendant with authenticated statements and reports of Government witnesses which relate directly upon his testimony.".

The Government, however, contends that as to Agent Minton the error was harmless. It also asserts—though the record is silent and counsel for petitioners deny it—

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[2] 18 U. S. C. § 3500 (b), *supra*, note 1.
[3] 18 U. S. C. § 3500 (e), *supra*, note 1.
[4] 18 U. S. C. § 3500 (e) (2), *supra*, note 1.
[5] 18 U. S. C. § 3500 (e) (1), *supra*, note 1.
[6] S. Rep. No. 569, 85th Cong., 1st Sess., p. 2.

that verbatim carbon copies of the reports of Agents Buescher and Mochel were delivered to the defense at the trial. But since its version of what transpired is contested, the Government urges that the most we do is to remand the case to the District Court to determine whether verbatim copies of the reports were delivered to the defense at the trial. If they were so delivered, the Government argues, the court's denial of their production was harmless error.

We do not follow that suggestion. We deal with the record as we find it, which gives no support to the Government's assertion that verbatim reports were delivered to the defense. Moreover, the Government's assertion is not a positive statement of the prosecution. Those who present the case here say with candor that they speak only "according to our information" which admittedly falls short of an assertion that the copies were delivered to the defense at the trial. Since the defense earnestly denies the statement, we can only conclude that on the record before us petitioners were denied an inspection of the documents to which they were entitled.

We put to one side *Rosenberg* v. *United States*, 360 U. S. 367, where a failure to produce a document was considered to be harmless error under the particular circumstances of that case. We do not reach the harmless error point because, if applicable, it is relevant only to the report of one of the agents, not to those of the other two. Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively. As we said in *Jencks* v. *United States*, *supra*, 667:

> "Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a

different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

Accordingly we conclude that at least as respects some of these statements reversible error was committed and that petitioners are entitled to a new trial. There are other questions raised that we do not reach, as we have no way of knowing whether they will arise on a new trial.

Reversed.

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

Dated June 26th, 19 56

Thomas D Clancy
(Signature)

Partner
(State whether individual owner, member of firm, or if corporation officer, give title)

16—62011-4

SUPREME COURT OF THE UNITED STATES

No. 88.—October Term, 1960.

Thomas D. Clancy, et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 27, 1961.]

Mr. Justice Clark, with whom Mr. Justice Frankfurter and Mr. Justice Harlan join, dissenting.

Petitioners were convicted of tax evasion and conspiracy to defraud the United States in the operation of a horse race booking enterprise. During the trial the defense asked for the production, under the Jencks Act, of certain signed memoranda of interviews of petitioners by government agents. The request was refused at the time. The Government, in its brief filed November 14, 1960, agrees that this refusal was error. It insists, however, that verbatim copies of the memoranda were delivered to the defense attorneys at a later stage in the trial during the cross-examination of one of the Government's agents. It requested, "unless petitioners agree with the [Government's] version of the facts," a remand of the case in order that the trial court might determine this sole question.

The attorneys for the petitioners made no reply to this claim of the Government until Thursday, January 5, 1961. In their reply brief on that date they categorically denied that verbatim copies had been delivered. This statement was later supported by affidavit of the attorneys.

The case came on for argument on Tuesday, January 10. The Government advised that the government employees involved in the case had not been available until the previous day and hence counter affidavits had not been obtainable. However, it offered to produce affidavits of

the agents, as well as the Assistant United States Attorney who tried the case, that would support its claim. In explaining the situation that confronted it, the government counsel stated that he had personally talked by telephone to the United States Attorney after petitioner's brief was filed. This conversation, he said, together with that had with the Assistant United States Attorney who tried the case, confirmed the earlier conclusion that the Government's contention was correct. However, since both the United States Attorney and his assistant made reference to the Government's witness (Agent Mochel, who had written the memoranda in controversy), government counsel also made every effort to reach Mochel and was successful on January 9. Mochel advised that when he was on the witness stand during the trial he had the carbon copies of his memoranda in his pocket and that upon request he took them out and handed them either (1) directly to petitioners' counsel or (2) to the Assistant United States Attorney trying the case, who passed them on to petitioners' counsel in the courtroom. This was verified by the Assistant United States Attorney who, however, candidly admitted that he was somewhat "hazy" as to what documents were actually passed by him to counsel. The record indicates that he had made available to petitioners' counsel a large number of documents, including the original notes of the agents. The Government insists that this factual situation creates "sufficient doubt" to require a hearing by the trial judge and a determination of whether or not the memoranda in controversy were actually delivered to petitioners' counsel.

This Court, of course, cannot determine these conflicting factual assertions on an affidavit basis. In view of the lateness of petitioners' denial, however, the Government was not afforded sufficient time to supplement the record on the point. The original record lodged here indicates that Agent Mochel, in his testimony, made ref-

erence to "memoranda" and, in context, the indications are that the "memoranda" in controversy were at that time in the hands of petitioners' counsel, who were questioning him. Under these circumstances it appears to me that justice does require that we remand the case solely for determination of this point. If the verbatim copies were not delivered, no harm will have been done, for the trial court could then set aside the judgments of conviction and grant a new trial. On the other hand, if the copies were actually delivered there could have been no prejudicial error and the judgments of conviction should stand.

The Court, however, refuses to order this done. It reverses the case on this technicality, regardless of the fact that the Government has persuasive evidence that petitioners' counsel actually had access to the very documents on which its reversal is based. The Court indicates that the Government's claim is outside the record. However, if the memoranda were in fact made available, as the Government claims, they were delivered during the trial and the record does have fleeting references that support such a conclusion. It would be a simple matter for these references to be made more complete at a hearing. In my view it is only fair that the Government should be given this opportunity. Moreover, I note that the Court has granted just such relief in many cases. See *Campbell* v. *United States*, 365 U. S. — (1961); *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233 (1957); *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115 (1956).